

No. 77-1457

Supreme Court, U.S.
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In the Supreme Court of the United States
OCTOBER TERM, 1977

LLOYD WOOD CONSTRUCTION COMPANY, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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On August 25, 1972, petitioner was awarded a federal contract to design and construct 300 units of family housing at Ft. Jackson, South Carolina, for \$5,838,164 (Pet. App. 2b). Petitioner contends that it suffered a loss of \$911,342.65 because of increases in prices for materials and services through December 31, 1975 (*ibid.*). It brought this suit in the Court of Claims, contending that it was entitled to recover this sum under the Small Business Emergency Relief Act, 89 Stat. 1095, 41 U.S.C. (Supp. V) 252 note.¹

¹The Act is confusingly reproduced in the petition. The portions of the statute at Pet. App. 6a-8a should have appeared at Pet. App. 3a, following paragraph (b) and preceding subparagraph (9).

There is no reason for the Court to grant review. Because the Act expired on September 30, 1976 (see Section 6(b); Pet. App. 5a), the case does not present any issue of continuing importance. Moreover, the decision of the Court of Claims is correct.

The court held that petitioner had failed to state a claim on which relief could be granted for two reasons. First, only Section 4(b) of the Act authorizes the award of money to small contractors, and, under that provision, the award must be in accordance with regulations. The regulations limited monetary relief to firms whose overall position was so poor that their ability to survive without relief would be open to question, and the Court of Claims held that petitioner could not qualify for relief in light of that regulation (Pet. App. 3b-4b). Second, the Act and its legislative history provide that executive agencies "may" grant monetary relief; because the statute creates discretion on the part of the executive branch, and because that discretion had been exercised against petitioner, there is no legal right to recover money (Pet. App. 4b-5b). See also *United States v. Testan*, 424 U.S. 392.

The express terms of the Act give discretion to executive agencies to decide whether to grant monetary relief to small businesses. Section 4(b) provides that "the head of the executive agency *may* modify the terms of the contract" (see Pet. App. 3a). The legislative history of the Act, which is recited by the Court of Claims (*id.* at 4b-5b), confirms that the statutory remedy is entirely discretionary. See, e.g., H.R. Rep. No. 94-154, 94th Cong., 1st Sess. 4 (1975) ("The bill would not require that the executive agency provide any relief but would merely authorize the head of the agency to either terminate the contract *** or *** grant a price increase"). Because the remedy is discretionary, there is no statute affirmatively requiring the payment of money, and the Court of

Claims had no authority to grant relief. See *United States v. Testan, supra*. Moreover, the administrative guidelines to which petitioner objects simply stated how the executive discretion would be exercised—that is, the guidelines stated that discretion would be exercised in favor of granting a price increase only if the denial of an increase would imperil the survival of the small business.² Petitioner does not contend that it was entitled to relief under the guidelines, and, consequently, it has not established that the contracting officer of his supervisor acted arbitrarily or capriciously.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1978.

²Petitioner's objection to the guidelines (Pet. 5) depends on its argument that the Act leaves no discretion to the executive agencies. We do not understand petitioner to argue that, if there is some discretion, the guidelines are an impermissible formulation of a principle for the exercise of that discretion. Petitioner's further argument (Pet. 6-7) that the contracting officer refused to exercise any discretion because he deemed himself bound by the guidelines misses the point that the criteria established by the guidelines structure and guide the exercise of discretion; in other words, discretion was exercised in favor of corporations that met the criteria of the guidelines. The guidelines enabled ranking officials of the agency to establish criteria under which lower officials would grant relief in particular cases.